Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145

COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

Julie M. Kearney
Vice President, Regulatory Affairs
Brian E. Markwalter
Senior Vice President, Research and Standards
Bill Belt
Senior Director, Technology and Standards

Consumer Electronics Association
1919 S. Eads Street
Arlington, VA 22202
(703) 907-7644

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SUMMARY

CEA recognizes and applauds the effort and hard work of the Commission and its staff in carefully crafting the new accessibility rules for advanced communications services ("ACS") and the *ACS Order*. The *ACS Order* balances the need to ensure access by individuals with disabilities to new technologies and services with the need to preserve service providers' and manufacturers' flexibility to innovate for the benefit of all consumers. The Commission should take this same balanced approach as it resolves the issues raised in the *ACS Further Notice*. In adopting further rules, the Commission should continue to hew closely to the statutory language of the Twenty-First Century Communications and Video Accessibility Act ("CVAA"), as informed by the CVAA legislative history.

Permanent Small Entity Exemption. To avoid unduly burdening small businesses, the Commission should permanently exempt small entities from the ACS rules. A permanent small entity exemption should be based on the qualification rules and size standards of the Small Business Administration, which will promote innovation by small manufacturers and service providers.

Mobile Browsers. The Commission should implement Section 718 of the Communications Act consistent with Section 716, including a similar phase-in. The CVAA does not provide the Commission with the authority to impose a broad accessibility requirement on all Internet browsers, and the Commission should confirm that Section 718 only applies to Internet browsers provided with telephones used with public mobile service. Moreover, Section 718 only applies to the "on-ramp" features and functions of covered mobile Internet browsers. The Commission should apply the *ACS Order*'s approach to accessibility and usability, recordkeeping, and enforcement to the implementation of Section 718. Consistent with the *ACS Order*, the Commission should also provide industry with a two-year phase-in to comply with the Commission's final rules implementing Section 718 and one year to implement the recordkeeping rules.

Interoperable Video Conferencing Services. The Commission should treat the insertion of the term "interoperable" into the CVAA as Congress intended: to limit the scope of video conferencing services covered by the statute. Consistent with the ordinary and widely-held meaning of "interoperable," the Commission should define that term to mean the ability to operate among different platforms, networks, and providers without special effort or modification by the end user. Comparing interoperability of Video Relay Services to the possible interoperability of market-based, commercially available video conferencing services is inappropriate. In addition, the Commission should not attempt to exercise ancillary jurisdiction to expand the accessibility requirements to cover non-real time services such as video mail. The accessibility and usability requirements applicable to interoperable video conferencing services should focus on the activation and/or initiation of a covered video communication, rather than on the content of the communication.

Accessibility of Information Content. The Commission should reject IT and Telecom RERCs' interpretation of the accessibility of information content requirement. The Commission's current rule reflects the statutory text and provides the necessary flexibility to enforce the legislative intent without creating uncertainty as to a covered entity's obligations.

Electronically Mediated Services. The definition of peripheral devices should not be amended to include "electronically mediated services" because the phrase, which is not found in the CVAA, lacks any clearly established meaning and its inclusion would only cause uncertainty and confusion regarding a covered entity's obligation.

Performance Objectives. IT and Telecom RERCs' proposed changes to the performance objectives should not be incorporated into the Commission's rules. The current performance objectives are proven and enforceable, and the RERCs' proposed changes would only reduce industry flexibility, inhibit innovation, and potentially undermine the accessibility of new technologies.

Safe-Harbor Technical Standards. Congress provided the Commission with the discretion to adopt safe-harbor technical standards but intended that such safe harbors would only be used in limited circumstances. Safe harbors may provide industry with useful guidance as long as the standards are not mandated. However, the adoption of ISO/IEC 13066-1:2011, W3C's Web Content Accessibility Guidelines, and/or the Access Board's Section 508 Guidelines as safe harbors is unnecessary to facilitate compliance with the ACS rules.

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COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

The Consumer Electronics Association ("CEA")[1] hereby responds to the Further Notice of Proposed Rulemaking ("*ACS Further Notice*")[2] seeking comment on additional issues relating to the implementation of the advanced communications services ("ACS") provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").[3] The

[1] CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA's more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than $190 billion in annual factory sales and employ tens of thousands of people.

[2] *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14677-14692 ¶¶ 279-317 (2011) ("*ACS Further Notice*").

[3] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code).

ACS provisions are codified in Sections 716, 717, and 718 of the Communications Act of 1934, as amended ("the Act").[4]

I. INTRODUCTION

CEA recognizes and applauds the effort and hard work of the Federal Communications Commission ("FCC" or "Commission") and its staff in carefully crafting the initial Report and Order ("*ACS Order*")[5] and rules adopted therein. The *ACS Order* balances the need to ensure access by individuals with disabilities to new technologies and services with the need to preserve service providers' and manufacturers' flexibility to innovate for the benefit of all consumers. The Commission should take this same balanced approach as it resolves the issues raised in the *ACS Further Notice*. Specifically, in adopting further rules, the Commission should continue to hew closely to the statutory language of Sections 716, 717, and 718 of the Act[6] as informed by the CVAA's legislative history.[7] CEA welcomes the continued opportunity to serve as a resource for the Commission as it addresses the open issues in the *ACS Further Notice*.

The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on Oct. 8, 2010, to make technical corrections to the CVAA and the CVAA's amendments to the Communications Act of 1934, as amended.

[4] 47 U.S.C. §§ 617, 618, 619.

[5] *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14559-14677 ¶¶ 1-278 (2011) ("*ACS Order*").

[6] 47 U.S.C. §§ 617, 618, 619.

[7] *See generally* H.R. Rep. No. 111-563 (2010) ("*House Committee Report*"); S. Rep. No. 111-386 (2010) ("*Senate Committee Report*").

II. TO AVOID UNDULY BURDENING SMALL BUSINESSES, THE COMMISSION SHOULD PERMANENTLY EXEMPT SMALL ENTITIES FROM THE ACS RULES

The adoption of a permanent small-entity exemption from the ACS rules will promote innovation by small manufacturers and service providers and ensure that the application of the ACS rules will not burden small businesses and entrepreneurial organizations that do not have the "legal, financial, or technical capability" to comply with such requirements.[8] Consistent with the temporary small entity exemption adopted in the *ACS Order*, the Commission should adopt the rules and size standards of the Small Business Administration ("SBA") to determine whether an entity qualifies for a permanent exemption.[9]

As an initial matter, such an approach is consistent with the CVAA's legislative history, which directed the Commission to consult with the SBA in defining "small entity."[10] Moreover, adopting the SBA's well-established rules and size standards will provide clarity and certainty in applying the exemption. Many of the small manufacturers who would be covered by the ACS rules, absent an exemption, have had little, if any, prior exposure to FCC regulation. However, many of these entities have regular interaction with the SBA and are familiar and conversant with the SBA rules and size standards. Any potential benefit of the Commission adopting its own unique qualification rules and size standards in this context is outweighed by the regulatory efficiency of adopting the widely-understood SBA qualification rules and size standards.

To further minimize the burdens on small entities and increase administrative efficiency, the permanent small-entity exemption should (i) apply to any product or service as long as the

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[8] *House Committee Report* at 26.

[9] *See* 47 C.F.R. § 14.4 (incorporating the SBA's size standards and qualification rules, including 13 C.F.R. §§ 121.105 (defining "business concern"), 121.103 (determining "affiliates"), 121.107 (determining primary industry), 121.201 (describing the size standards)).

[10] *House Committee Report* at 26.

manufacturer or service provider qualified as a small entity at the time the product or service was designed and developed[11] and (ii) be self-executing (*i.e.*, an entity would not be required to seek a prior determination of whether it qualifies for the exemption).[12] A small entity should be allowed to assert the exemption in an enforcement proceeding as a complete defense to any alleged violation of the ACS rules.

III. SECTION 718 SHOULD BE IMPLEMENTED CONSISTENT WITH SECTION 716, INCLUDING A SIMILAR PHASE-IN

Section 718 generally requires that if a manufacturer or provider of a telephone used with public mobile services includes an Internet browser in such telephone, the manufacturer or provider must ensure that the functions of the included browser are accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable.[13] Section 718 does not take effect until October 8, 2013.[14] In the *ACS Further Notice*, the Commission seeks comment on the implementation of Section 718, but also apparently seeks to use it to reinterpret the applicability of Section 716 to Internet browsers generally.[15]

A. The CVAA Does Not Provide the Commission with the Authority to Impose a Broad Accessibility Requirement on All Internet Browsers.

There is no support in the CVAA for the claim of the *ACS Further Notice* that Section 718 of the Act is an "exception" to a general accessibility requirement imposed on all Internet browsers.[16] No such general requirement exists.

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[11] *See ACS Further Notice*, 26 FCC Rcd at 14680 ¶ 286.

[12] *See id.* at 14680 ¶ 287.

[13] 47 U.S.C. § 619(a).

[14] *Id.* § 619 note.

[15] *See ACS Further Notice*, 26 FCC Rcd at 14683 ¶ 296.

[16] *See id.* ("We seek comment on our proposed clarification that Congress added Section 718 as an exception to the general coverage of Internet browsers as software subject to the requirements of Section 716 for Internet browsers built in or installed on mobile phones used by individuals

The CVAA does not support the reasoning of the *ACS Further Notice* that Section 718, which focuses on a subset of mobile browsers for individuals who are blind or have a visual impairment, implies the existence of a broad accessibility requirement that reaches *all* browsers for individuals with *all* types of disabilities.[17] Section 718 only requires that:

> If a manufacturer of a *telephone used with public mobile services* . . . includes an Internet browser in such telephone, or if a provider of mobile service arranges for the inclusion of a browser in telephones to sell to customers, the manufacturer or provider shall ensure that the functions of the included browser (including the ability to launch the browser) are accessible to and usable by individuals who are *blind or have a visual impairment*, unless doing so is not achievable.[18]

Section 718 simply does not address browsers or disabilities other than those described in its express terms, and certainly provides no basis for the broad proposals in the *ACS Further Notice*.

In addition, the general accessibility requirement of Section 716(a) provides no authority to the Commission to directly regulate Internet browsers or, in turn, developers of Internet browsers. The implementing rules adopted in the *ACS Order* recognize this limitation. As explained in the *ACS Order*, the requirements of Section 716(a) apply only to manufactures of "equipment" used for ACS.[19] The Commission narrowly defined "equipment" as the physical machine or device.[20] Thus, the manufacturer of the physical device used for ACS is the party responsible for compliance, and not the software developer (*e.g.*, an Internet browser developer)

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who are blind or have a visual impairment because of the unique challenges associated with achieving mobile access for this particular community.").

[17] *See id.*

[18] 47 U.S.C. § 619(a) (emphasis added).

[19] *Id.* § 617(a); *see ACS Order*, 26 FCC Rcd at 14581 ¶ 58.

[20] *See ACS Order*, 26 FCC Rcd at 14581-82 ¶¶ 60-62 (equating "equipment" to "physical machines and devices").

that is neither the manufacturer of the ACS equipment nor the provider of the ACS in question.[21] Consistent with the Commission's interpretation of Section 716, Section 718 cannot impose independent obligations on standalone mobile browser developers.

Moreover, Section 2 of the CVAA provides an express limitation on liability for violations of the ACS provisions of the Act ("Section 2 Liability Limitation"):

> [N]o person shall be liable for a violation of the requirements of [the CVAA] with respect to . . . advanced communications services, or equipment used to provide or access advanced communications services to the extent such person . . . provides an *information location tool*, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such . . . advanced communications services, or equipment used to provide or access advanced communications services.[22]

The "information location tool" discussed in this limitation on liability readily includes the functions and capabilities of a web browser. Other than Section 718 itself, this discussion is the only specific reference in the CVAA to a capability resembling a browser, and it limits, not expands, the scope of the ACS requirements.

B. Section 718 Only Applies to Browsers Provided With Telephones Used With Public Mobile Service.

The Section 718 requirements do not extend to devices that only utilize wireless broadband service, a non-common carrier, information service.[23] More specifically, the Commission is not authorized to impose the Section 718 requirements on data-only devices such as laptops, tablets, or other products that use only wireless broadband services. The requirements of Section 718 are limited to Internet browsers provided with "telephones used

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[21] *See id.* at 14581-83 ¶¶ 60-63.

[22] 47 U.S.C. § 153 note (emphasis added).

[23] *See generally Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

with public mobile service."[24] The term "telephones used with public mobile services" is defined as

> telephones and other customer premises equipment used in whole or in part with air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, or other common carrier radio communication services covered by title 47 of the Code of Federal Regulations, or any functionally equivalent unlicensed wireless services.[25]

Therefore, the Commission should make clear that the Section 718 requirements do not reach data-only mobile devices.

C. Section 718 Only Applies to the "On-Ramp" Features and Functions of the Covered Mobile Internet Browsers.

A critical distinction which the CVAA draws and which the Commission must bear in mind as it moves forward is the distinction between the functions of the browser itself, and the Internet content, applications, and services that a user may reach via the browser. Section 718, by its terms, limits the Commission's authority to requiring accessibility and usability with respect to the visually impaired only of those features and functions of covered mobile browsers that provide the "on-ramp" to the Internet (*i.e.*, the initiation and navigation functionality of the covered mobile browser), and not the content, applications, or services made available via the Internet. Specifically, Section 718 provides that "this subsection shall not impose any requirement on [the covered] manufacturer or provider . . . to make Internet content, applications, or services accessible or usable (other than enabling individuals with disabilities to *use* an included browser to access such content, applications, or services)."[26]

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[24] 47 U.S.C. § 619(a).

[25] *Id.* § 610(b)(4)(B).

[26] *Id.* § 619(a)(2) (emphasis added).

This approach is consistent with other provisions of the CVAA. For example, Section 2's general exemption of "information location tools," a category that, as discussed above, includes browsers, provides further support for the argument that the Commission's Section 718 authority is limited to requiring the accessibility and usability of the "functions" of covered mobile browsers used to access the Internet, and not the content, applications, or services available via the Internet. Moreover, the CVAA's legislative history bears this out by stating that "[n]ew section 718 requires that the *functions on* Internet browsers included on smart phones are accessible to and usable by individuals who are blind or have visual impairments, if doing so is achievable."[27]

In addition, the Commission should recognize that industry already is working to increase the accessibility of content accessed through a browser, rendering regulatory action unnecessary. For example, CEA supports the development of accessibility standards for mobile browsers, including accessibility application programming interfaces ("APIs"). Any such standards should be developed in a consensus-based, industry-led, open process that complies with American National Standards Institute ("ANSI") Essential Requirements.[28]

D. The *ACS Order*'s Approach to Accessibility and Usability, Recordkeeping, and Enforcement Should Be Applied to the Implementation of Section 718.

The Commission should interpret and apply the requirements of Section 718 consistent with the interpretation of Section 716 in the *ACS Order*. Specifically, Section 718 includes the same "achievable" and industry flexibility standards as set forth in Section 716.[29] Thus, the

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[27] *House Committee Report* at 27 (emphasis added).

[28] *See generally* American National Standards Institute ("ANSI"), *ANSI Essential Requirements: Due process requirements for American National Standards* (Jan. 2012) ("ANSI Essential Requirements"), *available at* http://www.ansi.org/essentialrequirements/.

[29] *Compare* 47 U.S.C. § 617(a)-(b) *with* 47 U.S.C. § 619.

Commission should apply the same case-by-case achievability analysis when applying Section 718. Similarly, the Commission should apply the recordkeeping and enforcement rules adopted in the *ACS Order* to the Section 718 requirements. Uniform recordkeeping and enforcement rules will help enable covered entities to implement integrated and consistent systems for Section 716 compliance, minimizing the burden on industry and the Commission alike.

E. Consistent With the *ACS Order*, the Commission Should Provide Industry With At Least a Two Year Phase-In to Comply With the Commission's Final Rules Implementing Section 718.

Consistent with the approach of the *ACS Order*, the Commission should require full compliance with the Section 718 rules two years after the release of the order establishing the final Section 718 rules. And, as a substantive matter, this approach is consistent with the Commission's decisions in the past to recognize the practical considerations of incorporating accessibility features in many other, similar situations.

In the *ACS Order*, the Commission concluded that a two-year phase-in period was appropriate due to "the need for covered entities to implement accessibility features early in product development cycles, the complexity of [the ACS] regulations, and [the] regulations' effects on previously unregulated entities."[30] The same logic applies here: covered entities will need to implement mobile browser accessibility features early in the product development cycle, the structure and complexity of the Section 718 rules will be similar to that of the Section 716 rules, and mobile browsers have not previously been regulated in this manner. A 24-month phase-in is also entirely consistent with other similar prior technical requirement implementations, including IP closed captioning,[31] closed captioning in digital television

[30] *ACS Order*, 26 FCC Rcd at 14601-02 ¶ 107.

[31] *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket

receivers,[32] wireless hearing aid compatibility,[33] E911 location accuracy requirements in handsets,[34] V-Chip requirements in television receivers,[35] CableCARD requirements,[36] and digital tuner requirements for television sets.[37] Such an approach would be consistent with the CVAA's requirement that Section 718 goes into effect three years after enactment and how the Commission has interpreted other timelines imposed by the CVAA.[38]

No. 11-154, Report and Order, FCC 12-9, ¶ 122 (rel. Jan. 13, 2012) ("*Closed Captioning Order*") (concluding that "two years is the appropriate amount of time to design and implement the functionality required by Section 203 of the CVAA . . . and to bring that functionality to market").

[32] *See Closed Captioning Requirements for Digital Television Receivers*, Report and Order, 15 FCC Rcd 16788, 16807-08 ¶¶ 56-58 (2000) (providing a 24-month phase-in period).

[33] *See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753, 16780 ¶ 65 (2003) (providing a 24-month phase-in period to meet the initial wireless hearing aid compatibility requirements).

[34] *See Wireless E911 Location Accuracy Requirements*, Report and Order, 22 FCC Rcd 20105, 20112 ¶ 17 (2007) (providing a 5-year phase-in period for compliance at the PSAP level), *voluntarily vacated*, Rural Cellular Ass'n v. FCC, 2008 U.S. App. LEXIS 19889 (D.C. Cir. Sept. 17, 2008).

[35] *See Technical Requirements to Enable Blocking of Video Programming based on Program Ratings*, Report and Order, 13 FCC Rcd 11248, 11257 ¶ 23 (1998) (providing television manufacturers with an approximately 22-month total phase-in period – approximately 16 months for compliance of at least half of their new product models and an additional 6 months for the remaining new models); *see also* 47 C.F.R. § 15.120.

[36] *See Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, 14803 ¶ 69 (1998) (providing an approximately 6.5-year phase-in period for CableCARD set-top boxes); *see also* 47 C.F.R. § 76.1204.

[37] *See Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978, 15996 ¶ 40 (2002), *as modified*, *Requirements for Digital Television Receiving Capability*, Second Report and Order, 20 FCC Rcd 18607, 18607 ¶ 1 (2005) (providing television manufacturers with a phase-in period totaling more than four years); *see also* 47 C.F.R. § 15.117(i).

[38] For example, the CVAA required that the Commission reinstate the video description rules within one year of enactment. 47 U.S.C. § 613(f)(1). The Commission adopted the rules in August 2011, and made the rules effective within one year of CVAA enactment, but delayed compliance until July 1, 2012 in recognition of the practical considerations facing service providers and equipment manufacturers. *See Video Description: Implementation of the Twenty-*

Similarly, the Commission should delay the compliance date of the Section 718 recordkeeping requirements for one year from the release of the order addressing the *ACS Further Notice*. Until the final Section 718 rules are released, the exact nature of the entities and products covered by the Section 718 rules will be unknown, and therefore, entities will be unable to determine whether or for which products they must keep records. Accordingly, a one-year phase-in of the recordkeeping requirements would provide covered entities with the necessary time to develop and implement these new requirements.

IV. THE COMMISSION SHOULD AVOID AN OVERLY BROAD DEFINITION OF INTEROPERABLE VIDEO CONFERENCING SERVICES

Although the Commission received a substantial record on the meaning of "interoperable video conferencing service" prior to release of the *ACS Order*, it requested additional comment on this issue in the *ACS Further Notice*.[39] As an initial matter, CEA applauds the Commission's conclusion that "[t]here simply is no language in the CVAA to support [the] view[ ] that interoperability is required or should be required, or that [the Commission] may require video conferencing services to be interoperable."[40] The Commission should now recognize that Congress's inclusion of the term "interoperable" narrowed the scope of the video conferencing services covered by the ACS provisions of the CVAA, consistent with the ordinary and widely-held meaning of the term.

First Century Communications and Video Accessibility Act of 2010, Report and Order, 26 FCC Rcd 11847, 11864-66 ¶¶ 34-37 (2011).

[39] *See, e.g.*, Letter from Julie Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3-4 (July 18, 2011); Comments of CEA, CG Docket No. 10-213, at 14-15 (Apr. 25, 2011); Reply Comments of CEA, CG Docket No. 10-213, at 8-9 (May 23, 2011).

[40] *ACS Order*, 26 FCC Rcd at 14577 ¶ 48.

A. "Interoperable" Should Be Given Its Ordinary and Widely-Held Meaning.

The Commission should take this opportunity to give effect to Congress's inclusion of the term "interoperable," which was added during the legislative process, even though other portions of the statutory definition were unchanged.[41] As a matter of statutory construction, the Commission should give meaning to all terms used in the CVAA.[42]

Consistent with the ordinary meaning of "interoperable,"[43] the Commission should define that term as the ability to operate among different platforms, networks, and providers without special effort or modification by the end user.[44] By doing so, the Commission will ensure that

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[41] *Compare* CVAA § 101 (defining "interoperable video conferencing service" as a form of "advanced communications services") *with* H.R. 3101, 111th Cong. § 101 (as introduced in the House, June 26, 2009) (defining "video conferencing" as a form of "advanced communications").

[42] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus 'reluctant to treat statutory terms as surplusage' in any setting."); *see also Association of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853, 862 n.22 (D.C. Cir. 1978) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." (internal quotation omitted)); *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.").

[43] *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotations omitted)); *see also American Mining Congress v. EPA*, 824 F.2d 1177, 1183 (D.C. Cir. 1987) ("The first step in statutory interpretation is, of course, an analysis of the language itself. As the Supreme Court has often observed, the starting point in every case involving statutory construction is the language employed by Congress. In pursuit of Congress' intent, we start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." (internal quotations and citations omitted)).

[44] *See, e.g.*, Institute of Electrical and Electronics Engineers, Standards Glossary (last revised Feb. 9, 2012), http://www.ieee.org/education_careers/education/standards/standards_glossary.html#sect9 (defining "interoperability" as the "[a]bility of a system or a product to work with other systems or products without special effort on the part of the customer"); *see also* Letter from Danielle Coffey, Vice President of Government Affairs, Telecommunications Industry Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1 (Aug. 10, 2011) (asserting that

only the subset of video conferencing services that are genuinely interoperable is covered under Section 716.

CEA's proposed definition of "interoperable" is consistent with widely-held meanings of the term. For example, Newton's Telecom Dictionary defines "interoperate" as "[t]he ability of equipment from several vendors to work together using a common set of protocols"[45] and Merriam-Webster's dictionary defines "interoperability" as the "ability of a system . . . to work with or use the parts of equipment of another system."[46]

B. Comparing Interoperability of Video Relay Services to the Possible Interoperability of Market-based, Commercially Available Video Conferencing Services is Inappropriate.

Although the *ACS Further Notice* raises issues regarding Video Relay Services ("VRS") in discussing interoperable video conferencing services, the Commission's approach to interoperability for VRS should not be used as a model or benchmark when defining interoperability in the ACS context.[47] Conversely, any attempt to improve or restructure the VRS industry should not be part of this proceeding.[48] Rather than looking to the specialized VRS industry, the Commission should base its interpretation of "interoperable" on the ordinary and widely-held definition discussed above. Doing so is the best way to address the meaning of

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this understanding of "interoperable" is reflected in Commission rules and precedent and consistent with the IEEE definition of "interoperable" as the "'ability of a system or a product to work with other products without special effort on the part of the consumer'").

[45] HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 508 (24th ed. 2008).

[46] *Interoperability Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriamwebster.com/dictionary/interoperability (last visited Feb. 9, 2012).

[47] *ACS Further Notice*, 26 FCC Rcd at 14685-86 ¶ 302.

[48] *See id*. The Commission has a separate proceeding completely dedicated to the improvement and restructuring of the VRS industry where such issues are being appropriately explored. *See Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Further Notice of Proposed Rulemaking, FCC 11-184 (rel. Dec. 15, 2011).

"interoperable video conferencing service" in the context of market-based, commercially available video conferencing services. As discussed below, the market based, commercial video conferencing services that are the subject of the ACS rules are far different from VRS.

VRS is a type of Telecommunications Relay Service ("TRS") that has developed pursuant to Section 225 of the Act,[49] not Section 716. As a comparison of these statutory provisions shows, Congress took two separate and distinct approaches to TRS services and to the accessibility of ACS. As the Commission has recognized, "Congress specifically mandated in Section 225 that relay services [*e.g.*, VRS] offer *access to the telephone system* that is '*functionally equivalent*' to voice telephone services."[50] Thus, consistent with Section 225, VRS is a specialized service, for which interoperability is mandated,[51] that enables persons with hearing and/or speech disabilities to obtain functionally equivalent telephone service.

In contrast, the CVAA does not incorporate the "functional equivalence" approach. Instead, the CVAA requires manufactures and service providers to make ACS equipment and services accessible to and usable by individuals with disabilities unless such accessibility and usability are not "achievable."[52] The purpose of the CVAA is "[t]o *increase the access* of

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[49] 47 U.S.C. § 225.

[50] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5442, 5444 ¶ 5 (2006) (emphasis added) ("*2006 VRS Declaratory Ruling*").

[51] The Commission first mandated interoperability for VRS in 2006 because of a very specific concern: that a major VRS provider did not permit its customers to place calls through competing VRS providers. Interoperability among VRS providers thus was needed in order to realize Section 225's goal of functional equivalence with voice telephone services. Moreover, interoperability was imposed as a condition to VRS providers receiving reimbursement from the TRS Fund. *See id.* at 5448-49, 5454, 5459 ¶¶ 16-17, 29, 43.

[52] *See* 47 U.S.C. § 617(a)(1), (b)(1).

persons with disabilities to modern communications . . . ,"[53] including ACS, not to regulate relay services such as VRS to meet a "functional equivalence" standard, as Section 225 does. The CVAA applies to a broad variety of ACS equipment and services commercially provided in competitive markets without the intervention of the FCC, in contrast to Section 225, which applies to the operation and public funding of a specific set of relay services, including VRS. Because of these fundamental differences in the approaches of Section 225 and the CVAA, VRS interoperability is an inappropriate model or benchmark for developing the meaning of "interoperability" in the context of the unregulated and highly competitive video conferencing marketplace.[54]

C. Expanding the Accessibility Requirements to Cover Non-Real Time Services Would Be an Inappropriate Use of Ancillary Jurisdiction.

Based on the plain language of the statute, the Commission does not have the authority to expand the definition of "interoperable video conferencing services" to include non-real time services such as video mail because the statute expressly limits the covered services to "*real-time* video communications."[55] Furthermore, the Commission should refrain from attempting to use ancillary jurisdiction to cover such non-real time services.[56] The courts have narrowly

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[53] *See* CVAA, 124 Stat. at 2751 (emphasis added).

[54] The Commission has previously recognized that TRS, including VRS, is "fundamentally different from the provision of wireless telephone, satellite television, or similar services . . . in that these services are market-based and, unlike TRS, are paid for by any consumer wishing to subscribe." *2006 VRS Declaratory Ruling*, 21 FCC Rcd at 5457 ¶ 38.

[55] "The term 'interoperable video conferencing service' means a service that provides *real-time* video communications, including audio, to enable users to share information of the user's choosing." 47 U.S.C. § 153(27) (emphasis added).

[56] *See ACS Further Notice*, 26 FCC Rcd at 14688 ¶ 307. As discussed above, VRS is an inappropriate model or benchmark for determining the scope of services covered by the ACS rules, including whether video mail and other non-real time services are covered by the ACS rules. *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, 20 FCC Rcd 13165, 13182 ¶ 36 (2005)

circumscribed the Commission's exercise of ancillary jurisdiction in recent years.[57] Assertion of the Commission's ancillary authority to bring video mail or other non-real time services within the ambit of the CVAA is inappropriate where Congress so clearly and specifically defined and limited the scope of services to be covered.[58]

D. The Accessibility and Usability Requirements Should Focus on the Activation and/or Initiation of a Covered Video Communication, Rather Than on the Content of the Communication.

As a general matter, the ACS rules, including the performance objectives,[59] should only apply to the activation and/or initiation of a covered video communications session.[60] The Commission should follow Congress's intent and make clear that the obligations of Section 716

(finding that VRS providers may be compensated from the Interstate TRS Fund for handling video mail for VRS users).

[57] *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) ("The Commission . . . may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."); *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) ("[T]he Commission maintains that congressional policy by itself creates 'statutorily mandated responsibilities' sufficient to support the exercise of . . . ancillary authority. Not only is this argument flatly inconsistent with [case law], but if accepted it would virtually free the Commission from its congressional tether.").

[58] *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) ("[T]he FCC can point to no statutory provision that gives the agency authority to mandate visual description rules. The rules may be highly salutary. But that is not the issue before this court. . . . What is determinative here is the FCC acted without delegated authority from Congress."); *id.* at 806 ("The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue."); *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (finding that ancillary authority "is really incidental to, and contingent upon, specifically delegated powers under the Act"); *see also Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005) (agency cannot use "general authority to expand the specific but more limited grant of exclusivity" provided in the statute); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (finding that a "general grant of rulemaking power . . . cannot trump specific portions of the [statute]").

[59] *See, e.g.*, 47 C.F.R. § 14.21.

[60] *See ACS Further Notice*, 26 FCC Rcd at 14686-87 ¶ 305.

only extend to "access and control these services," *i.e.*, the activation/initiation of a covered video communications session, and do not extend to the content or the communication itself.[61]

V. THE COMMISSION SHOULD REJECT THE RERCS' INTERPRETATION OF THE ACCESSIBILITY OF INFORMATION CONTENT REQUIREMENT

There is no logical or legal support for the Commission to adopt the interpretation of the accessibility of information content requirement suggested by the IT and Telecom Rehabilitation Engineering Research Centers ("RERCs").[62] In the *ACS Order*, the Commission appropriately incorporated the text of Section 716(e)(1)(B) into its rules,[63] and correctly concluded that the adopted rule is

> broad enough to disapprove of accessibility information being stripped off when information is transitioned from one medium to another and thus find it unnecessary to add this specific language

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[61] "The Committee notes that [video conferencing] services may, by themselves, be accessibility solutions. The inclusion, however, of these services within the scope of the requirements of this act is to ensure, in part, that individuals with disabilities are able to access and control these services." *Senate Committee Report* at 6; *House Committee Report* at 23. If the accessibility requirements were to be extended to cover the content of a video communication, the Commission should take a common-sense approach and recognize that the incorporation of instant messaging or similar text functionality as a compliant accessibility solution for deaf, hard of hearing, and/or speech impaired individuals.

[62] *See ACS Further Notice*, 26 FCC Rcd at 14840-41 App. F; *see also* Letter from Gregg Vanderheiden, Director IT Access RERC, Co-Director Telecommunications Access RERC, Trace R&D Center, University of Wisconsin-Madison, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 1-3 (June 17, 2011).

[63] *See ACS Order*, 26 FCC Rcd at 14599 ¶ 101; *compare* 47 U.S.C. § 617(e)(1)(B) ("[T]he Commission shall . . . (B) provide that advanced communications services, the equipment used for advanced communications services, and networks used to provide advanced communications services *may not impair or impede* the accessibility of information content when accessibility has been incorporated into that content for transmission through advanced communications services, equipment used for advanced communications services, or networks used to provide advanced communications services . . . ." (emphasis added)) *with* 47 C.F.R. § 14.20(a)(5) ("Providers of advanced communications services, manufacturers of equipment used with these services, and providers of networks used with these services *may not impair or impede* the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks." (emphasis added)).

in the rule itself, as originally suggested by the IT and Telecom RERCs.[64]

Nothing in the RERCs' proposed expansion of the rule changes this conclusion.[65] The current broad rule that reflects the statutory text provides the Commission with ample flexibility to enforce the legislative intent[66] without unnecessarily incorporating the RERCs' vague proposal, which would only cause uncertainty as to the obligations of service providers and manufacturers alike.

VI. THE DEFINITION OF PERIPHERAL DEVICES SHOULD NOT BE AMENDED TO INCLUDE "ELECTRONICALLY MEDIATED SERVICES"

The Commission should not amend the definition of "peripheral devices"[67] to include "electronically mediated services." On its face, the phrase "electronically mediated services" refers to services rather than equipment. Section 716 and the *ACS Order* make clear the distinction between equipment and services, making the inclusion of "electronically mediated *services*" within the definition of "peripheral *devices*" inappropriate.[68] Moreover, neither the *ACS Further Notice* nor any party proposes a definition of "electronically mediated services"[69] and that phrase does not even appear in the CVAA. In light of all these factors, to modify the

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[64] *ACS Order*, 26 FCC Rcd at 14599 ¶ 101 (internal quotations omitted).

[65] *ACS Further Notice*, 26 FCC Rcd at 14840-41 App. F.

[66] "The legislative history of the CVAA makes clear that the requirement not to impair or impede the accessibility of information content applies 'where the accessibility of such content has been incorporated in accordance with recognized industry standards.'" *ACS Order*, 26 FCC Rcd at 14600 ¶ 102 (quoting *Senate Committee Report* at 8 and *House Committee Report* at 25).

[67] 47 C.F.R. § 14.10(r) ("The term *peripheral devices* shall mean devices employed in connection with equipment, including software, covered by this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.").

[68] *Compare* 47 U.S.C. § 617(a) *with* 617(b); *see ACS Order*, 26 FCC Rcd at 14582 ¶ 62 (explaining that the "word 'device' refers to a physical object").

[69] *See ACS Further Notice*, 26 FCC Rcd at 14689 ¶ 309; IT and Telecom RERCs Comments, CG Docket No. 10-213, at 26-27 (Apr. 25, 2011).

definition of peripheral devices to include "electronically mediated services" would only create uncertainty and confusion regarding the extent of a manufacturer's or service provider's compatibility obligations.

VII. THE RERCS' PROPOSED CHANGES TO THE PERFORMANCE OBJECTIVES ARE NOT APPROPRIATE FOR INCORPORATION INTO THE COMMISSION'S RULES

Currently, Section 14.21 of the Commission's rules provides proven, concrete, and enforceable performance objectives based on the Commission's well-established Section 255 performance objectives.[70] The Commission should reject the proposed incorporation of specific tests and standards into the performance objectives because the proposed changes will reduce industry flexibility, inhibit innovation, and potentially undermine the accessibility of new technologies.[71]

The RERCs' proposed tests and standards are more appropriately considered for incorporation in the forthcoming "prospective guidelines,"[72] rather than as part of the mandatory performance objectives. Such an approach is fully consistent with the legislative history. Congress intended that the prospective guidelines "make[] it easier for industry to gauge what is necessary to fulfill the requirements" by providing industry with "as much certainty as possible regarding how the Commission will determine compliance with any new obligations."[73] Further consideration of RERCs' proposed tests and standards should be deferred until the Commission

[70] *Compare* 47 C.F.R. § 14.21(b)-(d) *with* 47 C.F.R. §§ 6.3(a), (b), (l) & 7.3(a), (b), (l).

[71] *See ACS Further Notice*, 26 FCC Rcd at 14689-90 ¶ 310.

[72] *See* 47 U.S.C. § 617(e)(2) ("Prospective guidelines. The Commission shall issue prospective guidelines for a manufacturer or provider regarding the requirements of this section.").

[73] *House Committee Report* at 25.

commences a "rulemaking to develop the required prospective guidelines after the Access Board issues its Final Guidelines."[74]

VIII. SAFE-HARBOR TECHNICAL STANDARDS SHOULD ONLY BE USED IN LIMITED CIRCUMSTANCES

Adoption of certain technical standards as "safe harbors" may provide industry with useful guidance, but compliance with such standards should not be mandatory.[75] Section 716 states that "the Commission may adopt technical standards as a safe harbor for such compliance if *necessary* to facilitate the manufacturers' and service providers' compliance" with the ACS accessibility, usability, and compatibility requirements.[76] In particular, there is no reason to believe at this time that the adoption of ISO/IEC 13066-1:2011, W3C's Web Content Accessibility Guidelines ("WCAG"), and/or the Access Board's Section 508 Guidelines as safe harbor technical standards is necessary to facilitate compliance with the ACS rules.[77] Accordingly, the risk and potential harm of creating *de facto* mandates outweighs any potential benefit of adopting these proposed safe-harbor standards.

As an initial matter, the Commission should establish procedural rules for the consideration and adoption of "necessary" safe-harbor standards without locking in outdated technologies or imposing implicit mandates. The Commission should only consider for adoption as safe harbors those technical standards that have been developed in a consensus-based,

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[74] *ACS Order*, 26 FCC Rcd at 14650 ¶ 218.

[75] *See ACS Further Notice*, 26 FCC Rcd at 14690 ¶ 311. For example, in another proceeding under the CVAA, the Commission properly adopted the Society of Motion Picture and Television Engineers ("SMPTE") Timed Text ("SMPTE-TT") standard as a safe harbor interchange and delivery format for the closed captioning of video programming delivered via Internet Protocol. However, the Commission refrained from mandating SMPTE-TT as the only standard that could be utilized to comply with the captioning rules. *See Closed Captioning Order* ¶ 124.

[76] 47 U.S.C. § 617(e)(1)(D) (emphasis added).

[77] *See ACS Further Notice*, 26 FCC Rcd at 14690-91 ¶ 312.

industry-led, open process that complies with ANSI Essential Requirements. The process should enable proponents to petition for the adoption of a safe-harbor technical standard and allow for the timely review, approval, and updating of such safe-harbor technical standards. Where industry participants use a safe-harbor standard, they would receive immunity from potential enforcement actions.

IX. CONCLUSION

As detailed above, the Commission should continue to provide the needed balance between increased accessibility for people with disabilities and flexibility for manufacturers and service providers to innovate for the benefit of all consumers as it adopts further rules implementing the ACS provisions of the CVAA.

Respectfully submitted,

CONSUMER ELECTRONICS ASSOCIATION

By: /s/ Julie M. Kearney

Julie M. Kearney
Vice President, Regulatory Affairs
Brian E. Markwalter
Senior Vice President, Research and Standards
Bill Belt
Senior Director, Technology and Standards

Consumer Electronics Association
1919 S. Eads Street
Arlington, VA 22202
(703) 907-7644

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